92-1658

Supreme Court, U.S
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No. _____

In The

Supreme Court of the United States

October Term, 1992

IRENE MEYERS, individually and in a representative capacity on behalf of the estate of Kelly Meyers,

Petitioner,

vs.

KATHRYN GUGGENHEIM, M.D.; K.J. KELLER, M.D.; K.H. LEE, M.D.; BERCHMANS RIOUX, M.D.; IRWIN J. EPSTEIN, M.D.; TRINITY MEDICAL CENTER; and ST. JOSEPH'S HOSPITAL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court grant review in a wrongful death case where the court below denied pendent party jurisdiction over state-law medical malpractice claims intermixed with federal civil rights (police brutality) claims, and where the denial –

- conflicts with rulings of several other federal circuits,
- leads to duplicative litigation with consequent inconvenience and burden to the justice system, and
- precludes the claimant, because of the absence of a state "savings" statute or an "equitable tolling" doctrine, from having a day in court on plainly compelling tort claims?

2. Did the Eighth Circuit err in interpreting *Finley v. United States*, 490 U.S. 545 (1989), to require that a federal jurisdictional statute *explicitly* confer pendent party jurisdiction over state law claims in order that such jurisdiction be accommodated in federal court?

3. After *Finley* and before the enactment of 28 U.S.C. § 1367, was it nonetheless open for the federal court below to accept pendent party jurisdiction under either 28 U.S.C. § 1331, which grants federal jurisdiction over "all civil actions arising under the . . . laws . . . of the United States," or under 28 U.S.C. § 1343(a)(3), which confers jurisdiction over "any civil action . . . to redress the deprivation . . . of any right, privilege or immunity. . . . "?

PARTIES TO THE PROCEEDING

The parties listed in the caption, and no others, were parties to this action in the United States Court of Appeals for the Eighth Circuit. Diane Goodluck, in her capacity as an officer, agent or employee of the New Town Police Department was erroneously included in the case caption in the Eighth Circuit pleadings and opinion below. Ms. Goodluck was actually an employee of the Bureau of Indian Affairs and was dismissed from the case by virtue of settlement with all federal defendants in the federal district court action below. In addition, Dr. Berchmans Rioux was inadvertently listed in the Eighth Circuit case caption as Dr. Bernard Rioux.

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No. _____

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October Term, 1992

IRENE MEYERS, individually and in a representative capacity on behalf of the estate of Kelly Meyers,

Petitioner,

vs.

KATHRYN GUGGENHEIM, M.D.; K.J. KELLER, M.D.; K.H. LEE, M.D.; BERCHMANS RIOUX, M.D.; IRWIN J. EPSTEIN, M.D.; TRINITY MEDICAL CENTER; and ST. JOSEPH'S HOSPITAL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is officially reported at 983 F.2d 905 (8th Cir. 1993) and is reproduced as Appendix A. The decision of the United States District Court for the District of North Dakota is not officially reported but is unofficially reported in Westlaw at 1991 WL474667. It is reproduced as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was issued January 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

28 U.S.C. § 1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1343(a)(3):

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . . "

STATEMENT OF THE CASE

Kelly Meyers, an American Indian then living on the Ft. Berthold Indian Reservation (in New Town, North Dakota), was arrested in his girlfriend's apartment for

disturbing the peace on July 5, 1988. In the course of the arrest by federal (Bureau of Indian Affairs) and New Town police, Meyers suffered a spinal cord injury, which went undetected at the time. After spending the night in the New Town jail he was taken to an off-reservation hospital in Minot. Although paralyzed from the chest down, he was diagnosed as a malingerer and put in a psychiatric ward. Less than two days later he went into respiratory failure and slipped into a coma. He died on July 19, 1988.

His mother, on her own behalf and that of her son's estate and other heirs, on July 3, 1990, filed a timely federal lawsuit against potentially culpable parties – the law enforcement officials and medical providers. Federal statutory claims were asserted against the police officers under the Federal Tort Claims Act (which gave the federal courts, in 28 U.S.C. § 1346, *exclusive* jurisdiction) and against the New Town police under 42 U.S.C. § 1983 (civil rights claims) and 28 U.S.C. § 1343(a)(3) (conferring federal jurisdiction over civil rights claims). Federal constitutional ("*Bivens*") claims were also asserted against individual BIA police officers, over which federal question jurisdiction was invoked under 28 U.S.C. § 1331.

State law medical malpractice and wrongful death claims against the medical providers were joined with police brutality claims. The medical providers were treated as joint tortfeasors whose wrongdoing arose out of a "common nucleus of operative facts," predicating the pendent jurisdiction of the federal district court.[1]

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[1] Originally, and erroneously, the petitioner claimed diversity jurisdiction of the district court over the state law claims

All federal claims were settled in early 1991. Thereafter, the five physicians and two hospital defendants moved on April 17, 1991, to dismiss the state malpractice claims on jurisdictional grounds. On August 27, 1991, the federal district court, purporting to follow *Finley v. United States*, 490 U.S. 545 (1989), granted the motion to dismiss.[2] The Eighth Circuit affirmed on January 14, 1993. *Meyers v. Trinity Medical Center*, 983 F.2d 905 (8th Cir. 1993). The Court of Appeals "disagree[d] with appellant's contention that *Finley* requires only an *inferred* Congressional intent for expanded jurisdiction," and went on to hold that none of the federal statutes jurisdictionally relied on by petitioner "contain[ed] an affirmative grant of pendent party jurisdiction as required by *Finley*." *Id.* at 907 (emphasis added).[3]

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because of petitioner's foreign (Texas) citizenship. After diversity was found lacking due to a change in statutory law (28 U.S.C. § 1332), Mrs. Meyers relied solely on the *pendent* jurisdictional basis for asserting her state law claims in federal court.

[2] The result in *Finley* was later repudiated by Congress in the enactment of P.L. 101-650, codified at 28 U.S.C. § 1367, applicable "to civil actions commenced on or after the date of the enactment of this Act [December 1, 1990]." Section 310(c). The *Meyers* case was commenced on July 3, 1990.

[3] After the district court dismissal, the petitioner sought to bring her state law claims in the North Dakota state court system, notwithstanding the expiration of the state two year statute of limitations during the pendency of the federal district court proceedings. Her "equitable tolling" argument, *viz.*, that the statute should have been tolled after the federal litigation had been timely initiated, was rejected by the North Dakota trial court on March 30, 1992, and the case dismissed. The North Dakota Supreme Court affirmed the dismissal on December 1, 1992. *Burr v. Trinity Medical Center*, 492 N.W.2d 904 (N.D. 1992).

REASONS FOR GRANTING THE WRIT

Introduction

Since Congress in late 1990 enacted the supplementary jurisdiction statute, 28 U.S.C. § 1367, and overturned the result in *Finley*, cases that otherwise might be concerned with problems of pendent party jurisdiction have enjoyed relatively smooth sailing in those treacherous waters. However, the approximately eighteen-month hiatus between the *Finley* decision and the effective date of the supplementary jurisdiction statute was a period of uncertainty and inconsistency among the circuits concerning pendent party jurisdiction, and otherwise meritorious cases were sometimes cast adrift by anomalous interpretations of *Finley*. This is one of those cases.

Given (a) the conflict in the circuit courts of appeal over the interpretation and application of *Finley*, (b) the maladministration of the judicial system bred by the Eighth Circuit's interpretation of *Finley* – in particular, the multiplicity of litigation and the possibility of internally inconsistent verdicts arising out of the same case, and (c) the plain miscarriage of justice resulting from the Eighth Circuit's decision in this case, petitioner submits that this Court's intervention is necessary here.

Indeed, this case lends itself to summary review and, petitioner submits, summary reversal. *See* Sup. Ct. Rule 16.1.

1. *Conflict in the Circuits*

After *Finley* was decided on May 22, 1989, there was a plethora of litigation and a good deal of confusion over its impact on pendent party jurisdiction of the federal

courts. *Finley* had held that pendent party state law claims could not be entertained in federal court where the only basis for federal jurisdiction was the Federal Tort Claims Act. *Finley v. United States*, 490 U.S. 545, 552-53 (1989). The court reasoned that the FTCA, which confers jurisdiction over "civil actions on claims against the United States," limited access to federal court only to those parties involved in the FTCA claim and could not also support jurisdiction over related claims against other defendants over whom no independent basis of federal jurisdiction existed. *Id.*

Some courts, notably the Eighth and Eleventh Circuits, and arguably the Sixth Circuit, read *Finley* to preclude pendent party jurisdiction unless the federal statute predicating jurisdiction contained an *affirmative* grant of pendent jurisdiction. *See*, in addition to *Meyers* below, *Alumax Mili Products v. Congress Financial Corp.*, 912 F.2d 996, 1006 (8th Cir. 1990); *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299 (8th Cir. 1990), *cert. denied*, 498 U.S. 847 (1990), *and cert. denied sub nom Missouri Pacific R. Co. v. Ray*, 498 U.S. 847 (1990); *Ortega v. Schramm*, 922 F.2d 684, 690 (11th Cir. 1991); *also, Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990), *reh'g denied.*

Of all the Circuits, the Eighth seemed to read *Finley* most restrictively. Indeed, under the Eighth Circuit's opinion in *Meyers*, courts would have to find an *explicit* affirmative grant of pendent party jurisdiction in order to accommodate closely related state law claims asserted against a party not named in the "federal" cause of action. That would essentially eliminate pendent party jurisdiction, a result rather clearly not intended by this

Court in *Finley*. *See* Note, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 William Mitchell L. Rev. 753, 763 (1991) ("In *Lockhard v Missouri Pacific Railroad*, the court of appeals' interpretation of *Finley* may have sounded the death knell for pendent party jurisdiction in the Eighth Circuit"); *see also Staffer v. Bouchard Transp. Co. Inc.*, 878 F. 2d 638, 643 n. 5 (2nd Cir. 1989) (*dictum*, noted *infra*).

On the other hand, several courts of appeal – the First, Fifth and Ninth – have read *Finley* more narrowly, so as to bar pendent party claims *only* when the federal jurisdictional statute(s) in question, like the FTCA in *Finley*, seemed on its face to limit federal court access to particular parties. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1587 (1990) (the "any civil action" language in the Foreign Sovereign Immunity Act (FSIA) removal statute "is broad enough to extend federal court subject matter jurisdiction over the entire action in which the foreign state is a party"); *Rodriguez v. Comas*, 888 F.2d 899, 906 (1st Cir. 1989), *reh'g denied* (the jurisdictional language in 28 U.S.C. § 1343(a)(3) is "open-ended" and supports federal jurisdiction over "any person," *i.e.*, pendent parties); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1407 (9th Cir. 1989) (the wording "any civil action" subsumes jurisdiction over an entire case, including pendent parties).

The Second Circuit mirrors the confusion by ruling both ways.[4] *Compare Staffer*, 878 F.2d at 643 n.5 ("pendent

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[4] So has the Eleventh Circuit, as recently reflected in *in re Surinam Airways Holding Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992)

party jurisdiction apparently is no longer a viable concept" (citing *Finley*)) *with Roco Carriers Ltd. v. M/V Nurnberg Exp.*, 899 F.2d 1292, 1296 (2d Cir. 1990) (pendent party jurisdiction available in admiralty cases because the relevant jurisdictional statute, 28 U.S.C. § 1333(1), confers jurisdiction over the entirety of an admiralty "case" and does not limit jurisdiction to particular parties).

In short, given the conflicting interpretations of *Finley*, the state of the law on pendent party jurisdiction prior to 28 U.S.C. § 1367, and perhaps after, is hopelessly confused. *See* Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 Emory L. J. 445, 446 (1991) ("the supplementary jurisdiction statute may well create as much confusion and uncertainty as is wrought by *Finley*"). That confusion has led to unpredictable and, in this case, indefensible results. This Court's review and resolution of the inter-circuit conflict would have the salutary effect of providing clearer guidance in interpreting similar controversies that arose prior to the effective date of 28 U.S.C. § 1367, as well as those that arise thereafter.

2. *Maladministration of Justice*

The result below breeds duplicative litigation and the real possibility of internally inconsistent results that

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(court finds that language "any civil action" supports federal pendent party jurisdiction in FSIA removal action, notwithstanding, and purporting to distinguish, *Ortega v. Schramm*, 922 F.2d 684).

defeat the interests and the credibility of the court system. The Eighth Circuit has said here that Mrs. Meyers should have brought two lawsuits against the joint tortfeasors – one in federal court against the police, the other in state court against the medical defendants. For a woman with limited resources, the prospect of trying the same issue (the cause of her son's death) twice – and running the risk in a comparative fault jurisdiction, like North Dakota, of incompatible results, *e.g.*, the federal jury trying the police officers finding the *doctors* primarily liable for death and the state jury trying the doctors finding the *police officers* primarily at fault – would be daunting, at the least. Further, the burden on congested judicial systems, and the cost to litigants already bending under heavy legal costs, would be particularly onerous.

In order to address the vexing result of the Eighth Circuit's curious reading of *Finley*, this Court should grant review.

3. *Miscarriage of Justice*

Mrs. Meyers joined *all* defendants, and all claims, in the one courthouse (federal) where she *had* to assert her primary federal claim (FTCA). This was an approach which was most likely to produce an expeditious, least costly (in terms of time, money and burden) and fairest (most internally consistent) result.

The decision of the Eighth Circuit, apart from its burdensome impact on the administration of the judicial system, has denied Mrs. Meyers an opportunity to present a palpably compelling claim of medical malpractice (misdiagnosis and mistreatment of a broken neck, resulting

in death) to a fact-finder, given the refusal of the North Dakota Supreme Court to accept the doctrine of equitable tolling. *See* fn. 3, *supra*. Without review by this Court, the decision below could appear as a judicial aberration and would bring discredit to the judicial system.[5]

CONCLUSION

For the reasons stated, the petition for certiorari should be granted and the Eighth Circuit's decision below reviewed.[6]

DATED this 14th day of April, 1993.

Respectfully submitted,

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[5] The assessment that the Eighth Circuit's "unnecessarily restrictive" (*see* Note, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, *supra*, 17 William Mitchell L. Rev. 774) interpretation of *Finley* could have potentially "devastating" (*id.* at 771) effects is borne out by the case *sub judice*.

[6] Further, given the unseemly result below, in contrast to the sound and sensible decisions in those circuits accepting pendent party jurisdiction, post-*Finley*, in cases like this one brought under broadly worded federal jurisdictional statutes (*see, e.g., Teledyne, Inc v. Kone Corp.*, 892 F.2d 1404; *Rodriguez v. Comas*, 888 F.2d 899), petitioner again respectfully commends summary reversal as an appropriate disposition.

United States District Court
District of North Dakota
Northwestern Division

Irene Meyers, individually, and on behalf of the Estate of Kelly Meyers, Plaintiff, vs. City of New Town, et al., Defendants.	Civil No. A4-90-138 (Filed Aug 27 1991)

MEMORANDUM AND ORDER

Defendants Trinity Medical Center, Dr. Kathryn Guggenheim, Dr. K.J. Keller, St. Joseph's Hospital, Dr. Berchmans Rioux, Dr. Irwin J. Epstein, and Dr. K.H. Lee, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, move the court to dismiss this action against them on the grounds that the court lacks jurisdiction over the subject matter.

Background

Plaintiff brought this wrongful death action in July, 1990. Her son Kelly Meyers, now deceased, was arrested in the early morning of July 6, 1988 by the Bureau of Indian Affairs (BIA) police and the City of New Town's chief of police. During the course of the arrest, Kelly suffered an injury to his spinal column. After being held in the jail Kelly was transported to Trinity Hospital in Minot, North Dakota. Later he was transferred to the

psychiatric ward at St. Joseph's Hospital in Minot where he went into respiratory failure. Kelly died on July 19, 1988.

Plaintiff filed suit in federal court. The claims against the government and the BIA were brought under the Federal Tort Claims Act (FTCA) and jurisdiction was asserted under 28 U.S.C. § 1346 (FTCA) and 28 U.S.C. § 1331 (federal question). The claims against the City of New Town were brought pursuant to 28 U.S.C. § 1983 and jurisdiction was asserted under 28 U.S.C. § 1343(a)(3) (civil rights claims.) The seven medical defendants were sued for malpractice and wrongful death and diversity jurisdiction was asserted under 28 U.S.C. § 1332.

Plaintiff has settled her claims against the government, BIA, City of New Town Police Department and the City of New Town a n d [sic] these defendants have been dismissed from this action. The only remaining defendants are the seven medical defendants who only have state-law claims asserted against them.

The remaining defendants now argue that the court does not have subject matter jurisdiction over them for lack of diversity and for lack of pendent party jurisdiction. The plaintiff contends this court has the discretion to exercise its pendent party jurisdiction and urges the court to do so in light of the court's familiarity with the case and potential prejudice to the plaintiff (statute of limitations concern.) The court must first determine whether it has any subject matter jurisdiction to exercise.

Law and Analysis

ISSUE: WHETHER THIS COURT HAS SUBJECT MATTER JURISDICTION OVER NONFEDERAL CLAIMS AGAINST THE SEVEN MEDICAL DEFENDANTS.

I. Diversity

In her complaint Plaintiff asserts there is diversity of citizenship, which is an independent jurisdictional basis whereby the court obtains subject matter jurisdiction. For purposes of determining diversity of citizenship "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." 28 U.S.C. § 1332(c)(2).

At the time this action was commenced, Irene Meyers, the representative of Kelly Meyers' estate, declared she was a resident of Texas. At the time of Kelly's death, he was a resident of North Dakota.[1] Therefore, for purposes of diversity of citizenship, Irene Meyers is deemed a citizen of North Dakota. The seven medical defendants are also residents of North Dakota. The court finds diversity of citizenship does not exist.

II. Pendent Party Jurisdiction

The Plaintiff contends that even if the court determines there is no independent jurisdictional basis present (no diversity jurisdiction), the court still has pendent

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[1] Although Plaintiff's counsel admits he was unaware of the amendment to the diversity of citizenship statute as it relates to representatives of an estate, Plaintiff makes an unsuccessful attempt to convince the court that the residence of Kelly at the time of his death is unclear.

party jurisdiction over the state law claims asserted against the medical defendants. The remaining defendants argue that the court does not have pendent party jurisdiction over the remaining defendants' non-federal claims.[2] Pendent party jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 109 S.Ct. 2003, 2006 (1989).

Plaintiff asserts that the court's jurisdiction over the parties now dismissed arises under 28 U.S.C. § 1331 (federal question), the Federal Tort Claims Act, 28 U.S.C. § 2671 *et. seq.*, and the Federal Civil Rights Act, 28 U.S.C. § 1983. The jurisdictional basis for a federal tort claim and a federal civil rights claim is provided for in 28 U.S.C. §§ 1346(b) and 1343(a)(3), respectively.

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[2] Plaintiff appears to suggest that this court may have pendent claim jurisdiction. Pendent claims are state law claims which arise from the same "common nucleus of operative facts" as that of the substantial federal claim and which if "considered without regard to their federal or state character, . . . are such that [plaintiffs] would ordinarily be expected to try them all in one judicial proceeding." *Alumax Mill Products v. Congress Financial Corp.*, 912 F.2d 996, 1005 (8th Cir. 1990); quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The classic pendent claim jurisdiction case is one in which the plaintiff asserts two transactionally-related claims, one claim jurisdictionally sufficient and the other jurisdictionally insufficient, *against a single defendant* in one action. *Alumax*, 912 F.2d at 1005. In the present claim, there is not a jurisdictionally sufficient claim to which the jurisdictionally insufficient claim can be "pendent". Therefore, the court may not exercise pendent claim jurisdiction over the remaining defendants.

Pendent party jurisdiction must be assessed in light of the United States Supreme Court case *Finley v. U.S.*, 109 S.Ct. 2003 (1989). In *Alumax Mill Products v. Congress Financial Corp.*, 912 F.2d 996 (8th Cir. 1990), the Eighth Circuit Court of Appeal interpreted *Finley*. The court of appeals held that pendent party jurisdiction is only available if 1) a substantial federal claim and the state claim derived from a common nucleus of operative facts, and 2) Congress has affirmatively granted such jurisdiction. *Alumax*, 912 F.2d at 1006. Therefore, the text of the jurisdictional statute at issue must be examined to determine whether the language of the statute affirmatively provides for pendent party jurisdiction.

28 U.S.C. § 1331 – Federal Question

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The statute on its face does not refer to pendent party jurisdiction over state law claims. Therefore, the court finds Congress has not affirmatively granted pendent party jurisdiction. The court holds that 28 U.S.C. § 1331 does not authorize pendent party jurisdiction.

28 U.S.C. § 1346(b) – Federal Tort Claims Act

28 U.S.C. § 1346(b) confers jurisdiction over "civil actions on claims against the United States." The United States Supreme Court in *Finley*, analyzed this very provision to determine whether the statute affirmatively grants pendent party jurisdiction. The Court concluded that "against the United States" means against the United

States and no one else and "civil actions" does not include "civil actions in which there is a claim against the United States". *Finley,* 109 S.Ct. at 2008. The Court held that 28 U.S.C. § 1346(b) does not reach defendants other than the United States. *Id.* at 2009. Therefore, this court finds 28 U.S.C. § 1346(b) does not authorize pendent party jurisdiction.

28 U.S.C. § 1343(a)(3) – Civil Rights Claim

28 U.S.C. § 1343(a)(3) provides:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Again, upon a reading of this provision it is clear Congress does not affirmatively provide for pendent party jurisdiction. Section 1343(a)(3) does not authorize pendent party jurisdiction. The second factor necessary to find pendent party jurisdiction as stated in *Alumax,* is not present under any of the three statutory provisions stated above.[3]

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[3] Plaintiff informs the court that Congress repudiated the results in *Finley* and attempted to clear up the confusion created by *Finley* by enacting legislation to provide federal courts with statutory authority to hear supplemental claims arising from the

Based upon the foregoing, the court finds that it does not have jurisdiction over the claims and the remaining seven defendants. Therefore, the court hereby ORDERS that Defendants' joint motion to dismiss is GRANTED. (Doc. #151) It is further ordered that this action be dismissed as to Defendants Trinity Medical Center, Kathryn Guggenheim, K.J. Keller, St. Joseph's Hospital, Bernard Rioux, Irwin Epstein, and K.H. Lee, without prejudice and without costs or disbursements as to any party.

LET JUDGMENT BE ENTERED ACCORDINGLY.

SO ORDERED.

Dated this 27th day of August, 1991.

/s/ Patrick A. Conmy
Patrick A. Conmy,
Chief Judge
United States District Court

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same case or controversy and that involve the joinder or intervention of additional parties. The Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1367, applies to civil actions commenced on or after December 1, 1990. The present action was commenced prior to this date.

Civil No. A4-90-138

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27 day of August 1991.

EDWARD J. KLECKER, CLERK

By: Deborah Thomson
Deputy

Irene MEYERS, individually and in a representative capacity on behalf of the Estate of Kelly Meyers and other lawful claimants, Plaintiff-Appellant,

v.

TRINITY MEDICAL CENTER, a North Dakota medical service corporation; Kathryn Guggenheim, aka Dr. Kathryn Guggenheim; K J Keller, also known as Dr. K. J Keller; St. Joseph's Hospital, a North Dakota medical service corporation; Bernard Rioux, also known as Dr. Bernard Rioux; Irwin J. Epstein, also known as Dr. Irwin J. Epstein; K.H. Lee, also known as Dr. K.H. Lee, Defendants-Appellees.

Diane Goodluck, in her capacity as an officer, agent or employee of the New Town Police Department, Defendant.

No. 91-3242.

United States Court of Appeals,
Eighth Circuit.

Submitted May 13, 1992.

Decided Jan. 14, 1993.

Robert J. Golten, Boulder, CO, argued (S. Stephen Bowling, on the brief), for plaintiff-appellant.

Lance Schreiner, Bismarck, ND, argued (Michael G. Fiergola, on the brief), for defendants-appellees.

Before McMILLIAN, JOHN R. GIBSON and MAGILL, Circuit Judges.

McMILLIAN, Circuit Judge.

Irene Meyers appeals from a final order entered in the District Court[1] for the District of North Dakota dismissing her complaint alleging malpractice and wrongful death claims against two hospitals and five doctors (hereinafter collectively referred to as medical defendants)[2] for lack of federal subject matter jurisdiction. *Meyers v. City of New Town*, No. A4-90-138, 1991 WL 474667 (D.N.D. Aug. 27, 1991) (Memorandum and Order). For the reasons discussed below, we affirm the order of the district court.

For reversal, appellant argues the district court erred in requiring an express grant of pendent party jurisdiction and in holding there was no express affirmative grant of pendent party jurisdiction in the federal question jurisdiction statute, 28 U.S.C. § 1331, or the federal civil rights statutes, 28 U.S.C. § 1343(a)(3), and 42 U.S.C. § 1983. Appellant also contends that the district court abused its discretion in failing to assert pendent party jurisdiction over appellees, because the North Dakota statute of limitations on Meyers' claims against them has expired.

Appellant's son Kelly Meyers was arrested in the early morning of July 6, 1988, by Bureau of Indian Affairs police (assisted by the City of New Town, North Dakota, police chief). During the course of his arrest Mr. Meyers was injured and suffered what was later diagnosed as a broken neck, allegedly the result of excessive force. After

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[1] The Honorable Patrick A. Conmy, Chief Judge, United States District Court for the District of North Dakota.

[2] Medical defendants include Trinity Medical Center, St. Joseph's Hospital, Dr. Kathryn Guggenheim, Dr. K.J. Keller, Dr. Berchmans Rioux, Dr. Irwin J. Epstein, and Dr. K.H. Lee.

being locked up in the local jail overnight, he was taken to Trinity Medical Center where he was diagnosed as a "malingerer." From there he was transferred to the psychiatric ward at St. Joseph's Hospital. Mr. Meyers remained in the psychiatric ward for almost two days until he suffered respiratory failure and was pronounced brain dead on July 8, 1988. Mr. Meyers died on July 19, 1988.

Appellant brought this action on July 3, 1990, alleging Federal Tort Claims Act and constitutional tort claims against the federal and local government defendants and state wrongful death and medical malpractice claims against the hospitals and doctors. Appellant brought suit on behalf of herself, her deceased son's estate, and in a representative capacity on behalf of other surviving heirs. The original defendants included the Bureau of Indian Affairs, the City of New Town and its police chief, and the medical defendants. The case was brought in federal district court because the claims against the Bureau of Indian Affairs were brought under the Federal Tort Claims Act (FTCA) and jurisdiction was asserted under 28 U.S.C. § 1346(b) (FTCA) and 28 U.S.C. § 1331 (federal question) over which federal courts have exclusive jurisdiction. The civil rights claims against the Bureau of Indian Affairs and the City of New Town were brought pursuant to 42 U.S.C. § 1983, and jurisdiction was asserted under 28 U.S.C. § 1343(a)(3). Diversity jurisdiction was asserted initially and incorrectly under 28 U.S.C. § 1332 over the medical defendants who were sued for malpractice and wrongful death.

The Bureau of Indian Affairs, the City of New Town, their agents and employees, reached a settlement with

appellant and were dismissed from the litigation. After the settlement and dismissal of the claims against the government defendants, only state malpractice and wrongful death claims against the medical defendants remained for which there was no diversity jurisdiction. Appellant had initially asserted diversity jurisdiction over the medical defendants, but because of the 1989 change in diversity statute, there was no diversity.[3] On April 17, 1991, the medical defendants submitted a motion to dismiss the malpractice and wrongful death claims. The district court dismissed the action because it did not have subject matter jurisdiction over the medical defendants for lack of diversity and for lack of pendent party jurisdiction. This appeal followed.

Appellant argues that the district court misread and misapplied the standard set forth in *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) (*Finley*), in determining pendent party jurisdiction. Appellant argues that the district court unnecessarily searched for an explicit grant of pendent party jurisdiction, contending that *Finley* only requires a general inferred intent. We disagree with appellant's contention that *Finley* requires only an inferred Congressional intent for expanded jurisdiction and that any of the statutory bases for jurisdiction relied on by appellant grant such

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[3] Appellant was a resident of Texas at the time of the suit. Her residence and that of her son's child Kelly Dale Young (North Carolina) were thought to be determinative under the diversity statute, 28 U.S.C. § 1332. However, the statute was amended in 1989, making the residence of the decedent controlling. Kelly Meyers was a resident of the State of North Dakota, as were all the medical defendants.

jurisdiction. Appellant argues there is an implied affirmative grant of pendent party jurisdiction in 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), or both.

The district court properly assessed pendent party jurisdiction in light of the [sic] *Finley*, which held that pendent party jurisdiction exists only where Congress has affirmatively granted such jurisdiction. 490 U.S. at 549, 109 S.Ct. at 2006. This rule applies even where the claims against the additional parties derived from a common nucleus of operative facts and are such that the plaintiff would ordinarily be expected to try all the claims in one judicial proceeding. *Id.* at 549-50, 109 S.Ct. at 2006-07.

The Eighth Circuit interpreted *Finley* in *Alumax Mill Products, Inc. v. Congress Financial Corp.*, 912 F.2d 996 (8th Cir.1990) (*Alumax*) (Civil RICO). In *Alumax* we held that pendent party jurisdiction is available only if: (1) a substantial federal claim and the state claim derived from a common nucleus of operative facts, and (2) Congress has affirmatively granted such jurisdiction. *Id.* at 1006. Under this holding, the text of the jurisdictional statute at issue must be examined for an affirmative grant of pendent party jurisdiction. *Id.; see also Lewis v. Windsor Door Co.*, 926 F.2d 729 (8th Cir.1991) (FTCA); *Lockard v. Missouri Pacific R.R.*, 894 F.2d 299 (8th Cir.1990) (FELA); *Lather v. Beadle County*, 879 F.2d 365 (8th Cir.1989) (FTCA). "Under *Finley*, pendent party jurisdiction does not exist merely by the fact Congress has failed to negate it. Rather, pendent party jurisdiction exists only where Congress has *affirmatively granted* such jurisdiction." *Lockard v. Missouri Pacific R.R.*, 894 F.2d at 301 (footnote omitted, emphasis in original) *citing Finley*, 490 U.S. at 549, 109 S.Ct. at 2006.

Other courts have applied *Finley* to civil rights actions, holding that neither 42 U.S.C. § 1983 nor 28 U.S.C. § 1343(a)(3) contains an affirmative grant of pendent party jurisdiction. *See, e.g., Sarmiento v. Texas Board of Veterinary Medical Examiners,* 939 F.2d 1242, 1248 (5th Cir.1991) (42 U.S.C. § 1983 does not grant pendent party jurisdiction); *Ortega v. Schramm,* 922 F.2d 684, 691 (11th Cir.1991) (no pendent jurisdiction under 28 U.S.C. § 1343(a)(3) because the statute contains no affirmative grant of pendent party jurisdiction in cases under 42 U.S.C. § 1983); *cf. Iron Workers Mid-South Pension Fund v. Terotechnology Corp.,* 891 F.2d 548, 550-51 (5th Cir.) (ERISA did not supply a statutory grant of jurisdiction over a party; court lacked pendent party jurisdiction over state-law claims against that party) *cert. denied,* 497 U.S. 1024, 110 S.Ct. 3272, 111 L.Ed.2d 782 (1990); *Staffer v. Bouchard Transportation Co.,* 878 F.2d 638, 643 n. 5 (2d Cir.1989) (no pendent jurisdiction where there is no independent basis for federal jurisdiction over a party against whom only a state claim is asserted); *Exell v. Burlington Northern R.R.,* 724 F.Supp. 863, 864 (D.Wyo.1989) (FELA did not authorize jurisdiction over an additional party); *Community Coffee Co. v. M/S Kriti Amethyst,* 715 F.Supp. 772, 774 (E.D.La.1989) (courts do not have jurisdiction over contribution or indemnity claims against additional parties because statute does not specifically authorize it).

We agree with the district court that neither the federal question statute, 28 U.S.C. § 1331, the federal civil rights statutes, 28 U.S.C. § 1343(a)(3), nor 42 U.S.C. § 1983, contains an affirmative grant of pendent party

jurisdiction as required by *Finley*.[4] We agree with the district court that there was no federal jurisdiction over the state malpractice and wrongful death claims against the medical defendants.

Accordingly, we affirm the order of the district court.

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[4] This case does not fall within the supplemental jurisdiction of 28 U.S.C. § 1367 because the action commenced before December 1, 1990, the effective date of the statute. Title 28 U.S.C. § 1367 provides federal district courts with supplemental jurisdiction over all other claims that are so related to claims in the action within a court's original jurisdiction that they form part of the same case or controversy. Supplemental jurisdiction includes claims that involve joinder or intervention of additional parties.

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No. 92-1658

In The

Supreme Court of the United States

October Term, 1992

IRENE MEYERS,

Petitioner,

vs.

KATHRYN GUGGENHEIM, M.D., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a federal district court, applying *Finley v. United States*, 490 U.S. 545 (1989), have "pendent party jurisdiction" under the federal question jurisdiction statute, 28 U.S.C. § 1331, or the federal civil rights jurisdiction statute, 28 U.S.C. § 1343(a)(3), to hear state-law medical malpractice and wrongful death claims.

PARTIES TO THE PROCEEDING

Irene Meyers is the sole petitioner. She appeals the judgment of the United States Court of Appeals for the Eighth Circuit affirming the district court's dismissal of her action against the respondents. The respondents include: Kathryn Guggenheim, M.D.; K.J. Keller, M.D.; K.H. Lee, M.D.; Berchmans Rioux, M.D.; Irwin J. Epstein, M.D.; Trinity Medical Center; and St. Joseph's Hospital. The respondents were defendants in the district court below.

The United States Bureau of Indian Affairs, its agent, Jim Azure and employee, Diane Goodluck; the City of New Town Police Department, New Town, North Dakota, and its chief of police, Arthur Naumann, were defendants in the district court below. These governmental defendants reached a settlement with petitioner, were dismissed from the litigation and were not parties to this action in the Eighth Circuit.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Kathryn Guggenheim, M.D.; K.J. Keller, M.D.; K.H. Lee, M.D.; Berchmans Rioux, M.D.; Irwin J. Epstein, M.D.; Trinity Medical Center; and St. Joseph's Hospital, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. That decision is reported at 983 F.2d 905 (8th Cir. 1993).

STATEMENT OF THE CASE

Petitioner Irene Meyers, mother of the decedent, Kelly Meyers, brought this wrongful death action on July 3, 1990, in the United States District Court, District of North Dakota. Petitioner's son was arrested in the early morning of July 5, 1988, in New Town, North Dakota, by United States Bureau of Indian Affairs ("BIA") police (assisted by the City of New Town, North Dakota, police chief). During the course of his arrest, Kelly Meyers suffered an injury later diagnosed as a broken neck. This injury allegedly resulted from the use of excessive force in the arrest. After his overnight incarceration in the local jail, he was taken to Trinity Medical Center in Minot, North Dakota. He was then transferred to the psychiatric ward at St. Joseph's Hospital. He remained in the psychiatric ward for almost two days until he suffered respiratory failure on July 8, 1988. Kelly Meyers died on July 19, 1988.

Petitioner alleged Federal Tort Claims Act and Constitutional tort claims against the BIA, the New Town Police Department and their agents and officers, and state wrongful death and medical malpractice claims against the respondent hospitals and doctors. The claims against the BIA were brought under the Federal Tort Claims Act ("FTCA") and jurisdiction was asserted under 28 U.S.C. § 1346(b) (FTCA) and 28 U.S.C. § 1331 (federal question) over which federal courts have exclusive jurisdiction. The civil rights claims against the BIA and the City of New Town were brought pursuant to 42 U.S.C. § 1983, and jurisdiction was asserted under 28 U.S.C. § 1343(a)(3). The claims against these federal defendants were based

on the arrest and incarceration of Kelly Meyers in New Town, North Dakota, on July 5 and 6, 1988.

Petitioner sued the respondents under state law for malpractice and wrongful death over the medical treatment given to Kelly Meyers after he was transported 75 miles to Minot, North Dakota, on July 6, 1988. Diversity jurisdiction over the respondents was asserted initially and incorrectly under 28 U.S.C. § 1332. Respondents, in their answers to the complaints, immediately put petitioner on notice that federal jurisdiction over them did not exist. Further, petitioner was notified that the district court did not have jurisdiction to consider the claims against the respondents pendent to the federal action for lack of a statutory grant of such jurisdiction. Rather than take prophylactic action to ensure a forum for the state-law claims, petitioner prosecuted all claims against all defendants, including the respondents, in federal court.

The BIA, the city of New Town, their agents and employees, reached a settlement with the petitioner and were dismissed from the litigation. After the settlement and dismissal of the claims against the government defendants, only state malpractice and wrongful death claims against the respondents remained for which there was neither diversity jurisdiction nor any independent basis for federal jurisdiction. On April 17, 1991, the respondents submitted a motion to dismiss the state-law claims. On August 27, 1991, the district court dismissed the action because it did not have subject matter

jurisdiction over the respondents for lack of diversity and for lack of pendent party jurisdiction.[1]

The Eighth Circuit affirmed the district court on January 14, 1993. *Meyers v. Trinity Medical Ctr.*, 983 F.2d 905 (8th Cir. 1993). The Court of Appeals "agree[d] with the district court that neither the federal question statute, 28 U.S.C. § 1331, the federal civil rights statute, 28 U.S.C. § 1343(a)(3), nor 42 U.S.C. § 1983, contains an affirmative grant of pendent party jurisdiction as required by *Finley*." *Id.* at 907.

REASONS FOR DENYING THE WRIT

The Eighth Circuit's decision in *Meyers* is consistent with *Finley v. United States*, 490 U.S. 545 (1989). *Finley* held that pendent party jurisdiction exists only where Congress has affirmatively granted such jurisdiction. 490 U.S. at 549.

I. The Eighth Circuit's decision in *Meyers* is in harmony with all decisions of the Circuit Courts applying *Finley v. United States*.

No conflict exists in the Circuit Courts of Appeals concerning the rule in *Finley*. The Circuit Courts have consistently refused to permit the joinder of a pendent

[1] After the district court dismissed the action, petitioner abandoned diversity of citizenship as the basis for federal jurisdiction over the respondents. She also no longer relies upon 28 U.S.C. § 1346(b) (FTCA) for the exercise of pendent party jurisdiction.

party defendant under 28 U.S.C. § 1331 or § 1343(a)(3). Petitioner, nevertheless, seeks review of *Meyers* on the basis of an alleged conflict in the Circuit Courts' interpretation of *Finley*.

Petitioner relies on five cases to support her contention that a conflict exists in the Circuits: *In Re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992); *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1587 (1990); *Roco Carriers Ltd. v. M/V Nurnberg Exp.*, 899 F.2d 1292 (2d Cir. 1990); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989); and *Rodriguez v. Comas*, 888 F.2d 899 (1st Cir. 1989). These cases, however, do not concern the issue of whether a pendent party defendant may be joined in an action under the federal question jurisdiction (28 U.S.C. § 1331) or the federal civil rights jurisdiction (28 U.S.C. § 1343(a)(3)) statutes.

Surinam Airways, Nolan, and *Teledyne* involved the existence and scope of pendent party jurisdiction under the removal provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1441(d). The FSIA grants a foreign state defendant a broad right of removal under § 1441(d). Under § 1441(d), "[a]ny civil action brought in State court against a foreign state" may be removed to federal court by the foreign state.

In *Roco Carriers,* the Second Circuit applied *Finley* and recognized pendent party jurisdiction in admiralty cases because of the unique policies governing admiralty. The Second Circuit considered the availability of pendent party jurisdiction under 28 U.S.C. § 1292(d)(3) in light of the fact that various Circuits recognized pendent party jurisdiction in admiralty cases and that *Finley* seriously

questioned the continued viability of the doctrine. 899 F.2d at 1295, *citing Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (suggesting in dicta that "pendent jurisdiction apparently is no longer a viable concept"). The court refused to depart from the established rule of the Second Circuit that pendent party jurisdiction is available in the unique area of admiralty under the broadly worded statute ("Any civil case of admiralty or maritime jurisdiction") and the admiralty policy favoring efficient procedures for resolving maritime disputes. 899 F.2d at 1297.

The First Circuit's decision in *Rodriguez v. Comas* allowed the joinder of a pendent-party *plaintiff* in a § 1983 action. Mr. Rodriguez sued a municipality under 42 U.S.C. § 1983 seeking damages for wrongful arrest. Mrs. Rodriguez joined in the suit alleging that she suffered emotional distress as a result of her husband's arrest, and she sought damages under both § 1983 and state law. The First Circuit affirmed the district court's dismissal of Mrs. Rodriguez's federal claim and retention of her as a pendent party *plaintiff*. 888 F.2d at 907.

The Courts of Appeals that have considered the joinder of pendent party *defendants* under 28 U.S.C. § 1343(a)(3) have not permitted such joinder under *Finley*. *Sarmiento v. Texas Bd. of Veterinary Medical Examiners*, 939 F.2d 1242 (5th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684 (11th Cir. 1991). Further, the joinder of pendent party defendants is controlled by this Court's decision in *Aldinger v. Howard*, 427 U.S. 1 (1976), in which the Court refused to extend pendent claim jurisdiction under 28 U.S.C. § 1343(a)(3). Finally, the Eleventh Circuit found that 28 U.S.C. § 1331, as an alternative to 28 U.S.C.

§ 1343(a)(3) as a federal jurisdictional statute for § 1983 claims, does not confer federal jurisdiction over pendent party defendants. *Ortega*, 922 at 690 n. 7.

The Circuit Courts of Appeals will be confronted with few, if any, cases addressing pendent party jurisdiction under *Finley*. The United States Congress codified the doctrine of pendent jurisdiction in a supplemental jurisdiction statute, 28 U.S.C. § 1367.[2] The statute outlines specific guidelines for granting pendent jurisdiction. This case fell within the eighteen month gap between *Finley* (May 22, 1989) and the effective date of the statute (December 1, 1990). *Meyers* is not inconsistent with the new statute. Thus, there is no conflict or basis for certiorari.

The Eight Circuit properly applied *Finley* in this case. The Circuit Courts that have considered the joinder of pendent party defendants under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) are consistent and in harmony with *Finley*.

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[2] In 1990, Congress codified the doctrine of pendent jurisdiciton at 28 U.S.C. § 1367. Congress gave district courts both power to exercise supplemental (pendent) jurisdiciton and discretion in its use. Federal courts can exercise supplemental jurisdiction over state law claims where the claims arise out of the same case or controversy as the federal claim which is before the court. 28 U.S.C. § 1367. However, even under § 1367, the federal courts should decline to exercise jurisdiction over the respondents and the claims against them. *See Heller v. CACL Federal Credit Union*, 775 F.Supp. 839, 843 (E.D.Pa. 1991) ("the court should ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed.").

II. The state-law medical malpractice claims do not arise from a "common nucleus of operative fact" with the settled federal claims.

A party seeking to invoke the doctrine of pendent party jurisdiction, must satisfy the threshold inquiry whether the federal court has Article III power to exercise jurisdiction over the party over which there is no independent jurisdictional basis present. Two requirements must be met to establish that the court has Article III power: (1) the federal claims to which the party seeks to append the state claims must be substantial; and (2) the state claims must arise from "a common nucleus of operative fact" such that the party "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). *See also Finley*, 490 U.S. at 548-49.

The Eighth Circuit in *Meyers* never reached the *Gibbs* inquiry because it found that the jurisdictional statutes at issue did not permit pendent party jurisdiction. If the court had reached the issue, pendent party jurisdiction would also not be available because the state-law claims against the respondents did not derive from a "common nucleus of operative fact" with the petitioner's settled federal claims. The federal claims arose from the arrest of Kelly Meyers on July 5, 1988, and his incarceration on July 5 and 6, 1988, in New Town, North Dakota. The state-law claims arose from the medical diagnosis and treatment of Kelly Meyers after he was transported 75 miles to Minot on July 6, 1988.

The claims against the respondents did not arise from a common nucleus of operative fact with the claims over

which there was federal jurisdiction. Therefore, the federal courts lack the Constitutional power to exercise jurisdiction over the respondents. Certiorari is inappropriate.

III. Inefficiency and inconvenience and petitioner's failure to file an action in state court do not constitute a basis for the grant of certiorari.

Inefficiency and inconvenience do not constitute a basis for granting the writ. This Court in both *Finley* and *Aldinger* recognized that "the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal court." *Finley*, 490 U.S. at 555-56, *citing Aldinger*, 427 U.S. at 18. Efficiency and convenience do not create Article III jurisdiction.

Petitioner's failure to preserve her state-law claims by filing an action in state court also does not constitute a basis for granting certiorari. Petitioner voluntarily chose to bring suit against the respondents and the state-law claims in federal court. These claims could have been asserted in state court. Even after the respondents notified her in their answers that the federal court did not have subject matter jurisdiction, she chose to prosecute the action in federal court only. Petitioner cannot complain if federal jurisdiction does not encompass all of her possible claims, since it is she who chose the federal forum and "must accept its limitations." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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